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In The

Supreme Court of the United States

October Term, 1968

No. 799

THE LOCUST CLUB OF ROCHESTER, et al.,
Appellants,

v.

THE CITY OF ROCHESTER, et al.,
Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPELLEES' MOTION TO DISMISS

—

Motion to Dismiss

Appellees in the above-entitled case move to dismiss on the ground that the questions presented are so unsubstantial as not to need further argument.

Opinions Below

The Memorandum Decision of the Supreme Court (Appendix of the Jurisdictional Statement, pp. 1-11, [hereinafter App. A, JS,—]) is reported at 48 Misc 2d 763, 265 NYS 2d 744. The opinion of the Appellate Division in and

for the Fourth Judicial Department (App. A, JS, pp. 14-21) is reported at 29 AD 2d 134, 286 NYS 2d 99. The per curiam affirmance on the opinion of the Appellate Division and the dissenting opinion in the Court of Appeals of New York (App. A, JS, pp. 22-27) are reported at 22 NY 2d 802, 293 NYS 2d 903.

Jurisdiction

This suit was brought under New York Civil Practice Law and Rules Section 3001, seeking a declaratory judgment as to whether the ordinance creating the Police Advisory Board in the City of Rochester, New York, was valid, legal, and constitutional, and a temporary restraining order and permanent injunction prohibiting the Board from acting in any manner. The Supreme Court, Monroe County, entered an order declaring the ordinance inconsistent with charter provisions describing the authority of the Commissioner of Public Safety and therefore invalid in major part, on February 4, 1966. On January 11, 1968, the Appellate Division, Fourth Judicial Department, unanimously reversed the determination of the Supreme Court and entered an order declaring the ordinance valid and constitutional. The New York Court of Appeals affirmed the order of the Appellate Division per curiam, on the opinion of the Appellate Division, on June 14, 1968, with Judge John F. Scileppi dissenting on non-constitutional grounds. On September 26, 1968, the Court of Appeals entered an order denying appellants' motion for reargument but allowing the amendment of the remittitur to show that the Court had passed upon questions under the Constitution of the United States (App. A, JS, p. 50).

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1257(2).

Questions Presented

1. Whether the ordinance creating a Police Advisory Board to receive, investigate, and make recommendations upon citizen complaints of excessive or unnecessary physical force by members of the local police bureau constitutes a Bill of Attainder directed against police officers in violation of Article I Section 10 of the Constitution.

2. Whether the procedures of the Police Advisory Board including the rights of notice, representation by counsel, cross-examination of witnesses, and right to present evidence and call witnesses are violative of procedural due process under the Fourteenth Amendment.

3. Whether the authority of the Police Advisory Board to make public its recommendations constitutes cruel and unusual punishment of the police officer whose conduct was investigated, in violation of the Fourteenth Amendment.

4. Whether the creation of the Police Advisory Board to investigate complaints of excessive or unnecessary physical force by policemen against citizens is a denial to the policemen of the equal protection of the laws, in violation of the Fourteenth Amendment.

5. Whether cooperation of the Police Bureau and other City officers and employees with the Board in investigating the incident about which complaint was made, without the police officer's consent, violates the police officer's right against self-incrimination and invades his privacy in violation of the Fourteenth Amendment.

6. Whether findings of excessive or unnecessary physical force under the circumstances made by the Police Advisory Board investigating a policeman's conduct constitute determinations of criminality entitling the police officer,

under the Fourteenth Amendment, to indictment by a grand jury, trial by jury, and protection against double jeopardy.

7. Whether the words "excessive or unnecessary physical force" are so vague and indefinite as to render a nonpenal ordinance permitting the investigation of complaints of police brutality unconstitutional under the Fourteenth Amendment.

Statement

In the years preceding the creation of the Police Advisory Board in June, 1963, the City of Rochester (like many other urban centers) had experienced incidents of alleged police brutality which outraged substantial numbers of concerned persons in the community. Typical of the incidents of alleged brutality, and one which indisputably brought about the creation of the board, was the alleged beating of one Rufus Fairwell. Approximately a week after Mr. Fairwell's arrest on charges of assaulting two Rochester police officers, a protest march and meeting of a group of 300 persons was reported in a local newspaper. The group marched on City Hall where a resolution was read by Reuben Davis, a lawyer and President of the Rochester Chapter of the NAACP (later a judge of the City Court of Rochester) which was reported as stating:

> "—That within the past 18 months 'numerous instances of abuse of police authority and, indeed, acts of police brutality have been directed by a small number of police officers of the Rochester Police Bureau against members of the minority ethnic group of the community.'
>
> —That the present city administration (Democratic) and its predecessor (Republican) 'have failed to take any positive action to ascertain the identity of the Rochester Police Bureau personnel involved (in such a pattern of abuse and brutality) . . . or take corrective action against the known perpetrators . . . '

> —That 'this situation, if not immediately arrested and ameliorated, will have a harmful and deleterious effect on the quietude of the community and will adversely affect the enjoyment, by a substantial segment of the citizens of our community, of their constitutional and civil rights.' "[1]

At the same protest meeting one Obadiah Williamson, President of the Monroe County Non-Partisan Political League, expressed his concern that: "August is becoming a bad month in the City of Rochester." He recalled that the previous year there were meetings protesting the misuse of police dogs. Mr. Williamson concluded that "The relationship is at a low point at this time . . . and we are disturbed, profoundly disturbed. We have been unable to have adequate enforcement without brutality. We are not protesting law enforcement . . . We are protesting tonight the brutal beating of one Mr. Rufus Fairwell . . . what happened to Mr. Fairwell could happen to anyone, white or Negro."[2]

In the following months members of the Common Council of the City of Rochester (hereinafter "City Council") reflected upon the grievances of members of the community against the police and upon the poor relationship between the police and large segments of the community, and, in the Spring of 1963, a joint report by the City Council's Public Safety Committee and Law Committee recommended the adoption of an ordinance creating a police advisory board. The Board was to be composed of nine laymen and would function as a "non-police agency" of responsible citizens providing a "ready and simple outlet for

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[1]Record in the Court of Appeals, pp. 138-142.

[2]*Ibid.*

the expression of grievances alleging excessive use of force by police." (Report of Public Safety Committee and Law Committee, 1963 City Council Proceedings [Record in the Court of Appeals, pp. 75-78].)

The joint report listed nine reasons why a Police Advisory Board was urgently needed. In brief, the report recognized the feeling among many responsible citizens that adequate channels of communicating grievances involving police action do not exist and concluded that a police advisory board would: contribute to, rather than impair, the efficiency of police performance; prevent anger and frustrations over grievances from building a wall between citizens and police; protect the majority of the Rochester Police Bureau who perform capably and fairly from trial by whisper, rumor, and innuendo; strengthen bonds of mutual respect between police and citizenry; permit community attention to be devoted to other essential human rights; provide a ready and simple outlet for expression of grievances alleging excessive use of force by police by those persons to whom traditional legal routes of redress are remote; cure some of the problems of a metropolitan police force and some of the problems of a generally disadvantaged nonwhite minority; and offer a chance for the release of much undesirable emotion and hostility.

City Council passed the ordinance creating the Police Advisory Board and, on May 20, 1963, the City Manager appointed its nine members: three clergymen, a physician, a labor union official, a business executive, an attorney, an educator, and an accountant. Two members of the Board were black men.

The ordinance creating the Board[3] provides that no active law enforcement officer may serve as a Board member and prescribes the Board's jurisdiction and powers as follows:

> §10-10.2 [§17-2]. The purpose of this board is to hear complaints of citizens against any member of the Rochester Police Bureau for alleged acts which fall within the board's jurisdiction, to investigate these complaints, and to recommend such action as the board thinks appropriate on each complaint.
>
> §10-10.3 [§17-3]. The jurisdiction of the board is limited to consideration of complaints against any member of the Rochester Police Bureau, which complaint alleges the use of excessive or unnecessary physical force by a member of the Rochester Police Bureau against a person or persons.
>
> §10-10.4 [§17-4]. The powers of this board are limited to those of an investigative and advisory nature, without any judicial or disciplinary powers.

The procedures for receiving, investigating, and making recommendations with regard to complaints of excessive or unnecessary physical force by a police officer are outlined in the ordinance and elaborated upon in the rules and regulations adopted by the Board and authorized by the ordinance (App. B, JS).

The Board is empowered to receive, investigate, and make recommendations regarding police conduct and not "criminal" acts. It has no power to discipline a police of-

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[3]App. A. JS, pp. 27-34. Citations to the Municipal Code throughout this Motion to Dismiss are, in the first instance, to the numbered sections of the Code in existence at the commencement of this suit, since those are the numbers appearing throughout the Record and in the Memorandum Decision of the Supreme Court. The same provisions appear in the present Code although they bear the new numbers indicated in App. A, JS, pp. 27-34.

ficer believed to have used excessive or unnecessary physical force against a member of the community, it has no power to affect his job security in any manner. The Board cannot grant relief of any kind; it cannot impose fine or penalty upon a police officer. It makes recommendations to the Commissioner of Public Safety, who makes his own determination of the "probable cause of the charges" (Exhibit B, JS). If the Commissioner determines there is probable cause, he may then order a disciplinary hearing, and ultimately suspend, fire, fine or reprimand the police officer. Invariably, the Commissioner or someone in his department makes public the results of disciplinary proceedings, which have often already been brought to the public's attention when the local newspapers report the underlying incidents and the preferring of charges against named officers.

In those instances where the Commissioner determines that there is no probable cause and that there will be no disciplinary hearing the Board is authorized to make public its recommendations to the Commissioner. It is the only means by which the public can be apprised of the final step of the processing of the complaint against the officer. Again, as a practical matter, frequently members of the community are aware of the underlying incident and of the complainant's charge of police brutality.

Appellants contend that the ordinance creating the Police Advisory Board is a Bill of Attainder in violation of Article I Section 10 of the Constitution. They contend the Fourteenth Amendment due process requirements are violated as that amendment incorporates the first ten amendments, by denying their alleged rights to: indictment by a grand jury; trial by jury; compulsory process; cross-examination of witnesses; remain silent to avoid self-incrimination;

privacy; equal protection of the law; and protection from cruel and unusual punishment and double jeopardy. Finally, appellants contend that the ordinance creating the Board creates an indefinite and vague standard of "excessive or unnecessary physical force" to which the police officer should not be held to account because he cannot fairly pattern his conduct within permissible bounds.

ARGUMENT

I

The ordinance creating the Police Advisory Board with jurisdiction only to receive, investigate and make recommendations in connection with citizen complaints of excessive or unnecessary physical force by police is not a Bill of Attainder prohibited by Article I, Sec. 10 of the Constitution. This Court has consistently held that a Bill of Attainder is a legislative act that applies to named individuals or to a group of easily ascertainable persons in such a way as to inflict punishment on them without a judicial trial: *Cummings v. Missouri,* 4 Wall (US) 277, 18 Led 356, 363; *United States v. Lovett,* 328 U.S. 303, 315, 90 Led 1252, 1259; *United States v. Brown,* 381 US 437, 448-49, 14 Led 2d 484, 492. The Police Advisory Board ordinance (hereinafter "PAB ordinance" or "ordinance") does not single out named police officers or an easily ascertainable group of police officers but merely authorizes investigations of any police officer thereafter accused of using excessive or unnecessary physical forces against a citizen.

Moreover, the PAB ordinance does not impose a predetermined punishment on those individuals whose conduct is reviewed by the Board. In *Lanza v. Wagner,* 30 Misc. 2d

212, 220 NYS 2d 477, aff'd 15 AD 2d 552, 222 NYS 2d 1019, mod. 11 NY 2d 317, 229 NYS 2d 380, appeal dismissed 371 US 74, 9 Led 2d 163, cert. denied 371 US 901, 9 Led 2d 164, this Court was asked to review a New York statute on the ground that it inflicted punishment on the incumbent members of the New York City Board of Education and therefore constituted a Bill of Attainder. The statute was enacted following a legislative determination that there was cause for grave concern and a lack of public confidence in the manner in which the City's school system was being operated. The statute provided that the terms of all those then serving on the Board of Education would terminate on a certain date, and new appointments would be made by the Mayor under a new selective process. The New York Court of Appeals held that the statute did not inflict punishment on the ousted members of the Board of Education because their employment was terminated following public criticism of their conduct by the legislature. This Court dismissed the appeal as not raising a substantial federal question.

II

The procedures of the Police Advisory Board do not violate the procedural due process requirements of the Fourteenth Amendment. This Court held in *Hannah v. Larche*, 363 US 420, 440, 4 Led 2d 1307, 1320, that the requirements of due process vary with the type of proceeding involved. The Rochester Police Advisory Board may only investigate written, sworn allegations pertinent to its jurisdiction, study and collect information relating thereto, and make findings and recommendations to the Commissioner of Public Safety (who has direct disciplinary jurisdiction over police officers) and the City Manager. It may, if the Commissioner does not take action satisfactory to the Board, make public

its recommendations. The Police Advisory Board's function is investigative and fact-finding. Its authority is responsive to its purpose in existing: it is an impartial, irreproachable panel of lay persons receiving and investigating complaints of police brutality, making findings with respect thereto, forwarding those findings to the public officer charged with assuring the proper conduct of the municipality's policemen, and, when no further action is to be taken with respect to conduct the Board determines is excessive or unnecessary under the circumstances, expressing the Board's conclusion to the community entitled to be informed of the outcome. The Police Advisory Board, like the Federal Commission on Civil Rights reviewed in the *Hannah* case, *supra,* does not adjudicate, hold trials, or determine civil or criminal liability of police officers. It does not issue orders or indict, punish or impose any legal sanctions. It does not make determinations depriving anyone of his life, liberty, or property.

To the extent that the Board's authority to make public its recommendations may be held to place a greater burden on the Board in affording protections to the police officer whose conduct is being investigated, that burden is more than met by the rules and regulations of the Board which provide that a police officer is entitled to: (a) be notified in advance of any hearing of the contents of the verified complaint; (b) confront the complainant at the time of the hearing, cross-examine the complainant and his witnesses; (c) be represented by counsel or have counsel appointed for him; (d) present evidence and call witnesses on his own behalf.

These protections must be compared with the procedures of the Federal Commission on Civil Rights which were upheld under attack of violation of procedural due process.

Although that Commission had the authority to hold public hearings with television and newspaper coverage in connection with complaints of violations of civil rights, those persons against whom complaints were made were not entitled to cross-examine witnesses, be advised of the identity of the complainant, or present witnesses on their own behalf: *Hannah v. Larche, supra.* Moreover, in *Jenkins v. McKeithen,* 286 F. Supp. 537 (E.D. La.) prob. juris. noted, 37 US Law Week 3208, a three-judge federal court upheld the Louisiana Labor-Management Commission of Inquiry against an attack on procedural due process grounds. The Labor-Management Commission of Inquiry was charged by the legislature with the responsibility of investigating and finding facts relating to violations or possible violations of state and federal criminal laws in connection with labor-management relations. It was directed to supplement and assist local district attorneys in connection therewith, and to publicize its findings with respect to the question of whether there is probable cause for believing there were violations of the criminal law by certain individuals. The Labor-Management Commission of Inquiry did not permit the accused assistance of counsel, the right of confrontation, the right of cross-examination of witnesses, or the right to compulsory process for their witnesses.

III

The authority of the Police Advisory Board to make public its recommendations when its recommendations are to be the last step in the processing of a complaint of police brutality is not cruel and unusual punishment of the police officer whose conduct was investigated. The power to make public recommendations is not punishment. In *Trop v. Dulles,* 356 US 86, 96, 2 Led 2d 630, 639-40, this Court noted

that the purpose of the statute being reviewed is determinative of whether it is a penal law or not. If the statute imposes a disability for the purpose of punishment it is penal, but if it imposes a disability to accomplish some other legitimate governmental purpose it is not. Thus deportation and prohibition from carrying on a particular business have been upheld against a claim of cruel and unusual punishment: *Zwick v. Freeman,* 373 F 2d 110, 119 (2d Cir.), cert. denied 389 US 835, 19 Led 2d 96; *Burr v. Immigration & Naturalization Service,* 350 F 2d 87, 90-91 (9th Cir.).

The authority to make public its recommendations is not directed at punishing a police officer for unseemly conduct. It reflects a judgment of the municipality that the Police Advisory Board cannot serve its function in assuring citizens of an impartial depository for its grievances when grievances so channeled are never heard from again. That this ability to make public its findings is reasonably determined to be a prerequisite to a viable police advisory board, which in turn is a reasonable institution for promoting effective and impartial law enforcement, is confirmed by the *Report of The National Advisory Commission On Civil Disorders,* 143-144, 206, 291-292 (Bantam Press ed. 1968); *Report of the President's Commission on Crime in the District of Columbia,* p. 218 (1966).

Furthermore, the power to make public its recommendations to the Commissioner of Public Safety is not cruel and unusual, even were it to be considered, for purposes of argument, punishment. The concept of "cruel and unusual" reflects a judgment that punishment is disproportionate to the act being punished and is not reasonably related to a valid public purpose: *Zwick v. Freeman, supra,* 373 F. 2d at 119. This Court has recently observed that even as to the ordinary person "exposure of the self to

others in varying degrees is a concomitant of life in a civilized community": *Time v. Hill,* 385 US 374, 388, 17 Led 2d 456, 467. With respect to a policeman, this Court has noted that he is directly, immediately and entirely responsible to the city which is his employer. "He is a trustee of the public interest, bearing the burden of great and total responsibility to his public employer": *Gardner v. Broderick,* 392 US 273, —, 20 Led 2d 1082, 1086. Accord, *Spevack v. Klein,* 385 US 511, 519, 17 Led 2d 574, 580. Finally in *New York Times Co. v. Sullivan,* 376 US 254, 270, 11 Led 2d 686, 701, this Court recognized a national commitment to the principle that debate on public issues should be uninhibited, and that a vehement, caustic, and sometimes unpleasantly sharp attack on government and public officials is often a consequence of that commitment. If the police officer is accountable for his official acts which are, in turn, a public trust, if he is susceptible to vehement and caustic attacks by the public, then a dispassionate publication of findings relating to his official conduct where no penalty ensues cannot be said to constitute cruel and unusual punishment. In *Barr v. Matteo,* 360 US 564, 575, 3 Led 2d 1434, 1443, this Court upheld the defense of absolute privilege in a libel suit against a governmental department head who, after his department was attacked, issued a press release condemning several employees. This Court noted the importance of official response in matters of wide public interest and concern.

IV

The creation of the Police Advisory Board to review complaints of police brutality is not a denial to the police of the equal protection of the laws. The constitutional right to the equal protection of the laws goes no further

than prohibiting "invidious discrimination": *Loving v. Virginia,* 388 US 1, 10, 18 Led 2d 1010, 1017; *Baker v. Carr,* 369 US 186, 244, 7 Led 2d 663, 702; *Williamson v. Lee Optical of Oklahoma, Inc.,* 348 US 483, 489, 99 Led 563, 573. In *Williamson* this Court noted (348 US at 488, 99 Led at 572) that: "It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it." Accord, *Baker v. Carr,* 369 US at 253, 7 Led 2d at 707.

Rochester's City Council determined that the evil at hand in the matter now before the Court is the incidence or suspicion of police brutality against members of the community and its divisive effect thereon. The classification of police officers as a group reflects a realization that they are the representatives of governmental authority who are regularly exposed to situations requiring the use of force against the citizen[4], that the needless or excessive use of force by some of their number has been the cause of disharmony in the community and the abuse of the rights of some citizens. The fact that the conduct of all public employees is not made reviewable by the Police Advisory Board does not render this rational measure to channel grievances of police brutality violative of the equal protection clause of the Fourteenth Amendment: *Railway Express Agency v. New York,* 336 US 106, 110, 93 Led 533, 539.

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[4]Arthur Cornelius, Superintendent of the New York State Police addressed newly sworn state troopers advising them that: "You must live as though you are in a glass house for everyone observes your actions wherever you are": *O'Shea v. Martin,* 34 Misc. 2d 987, 989, 230 NYS 2d 935, 938.

V

Section 10-10.6 [17-6] of the Police Advisory Board ordinance provides that "All city officers and employees are hereby directed to cooperate with the Board in carrying out its duties." Appellants' contention that this statement of legislative intent authorizes and constitutes an unconstitutional search and seizure of a police officer's effects, an invasion of the privacy of the officer, and a violation of his right against self-incrimination are completely without merit.

The Police Advisory Board has no subpoena powers. Appellees have cited no incident of invasion of a police officer's home, papers, or person, neither have they accused the Police Advisory Board of claiming a right to do so. The Police Advisory Board has officially and consistently recognized what was implicit in the ordinance creating the Board, — the police officer's right to remain silent and not incriminate himself (Record in Court of Appeals, pp. 114-117). The precatory direction to city officers and employees to cooperate with the Board in investigating a specific charge of police brutality is not reasonably susceptible of the interpretation appellants urge upon the Court — the indiscriminate and coerced revelation of all information relating to the police officer whose conduct is being reviewed, whether pertinent to the inquiry or not.

The Board is entitled to the assistance of the Chief of Police by virtue of his independent investigation of the incident in which the allegedly excessive conduct occurred, and those others in the Police Bureau or elsewhere who would have information to contribute in that regard. Moreover, whether or not the ordinance had expressed this sense of cooperation in the Board's investigation on the part of other municipal employees, a police officer would have no

right (whether characterized as privacy, protection against search or seizure or self-incrimination) to prevent a departmental investigation and cooperation by his fellow police officers and other city employees with that investigation: *Mancusi v. DeForte,* ——US——, 20 Led 2d 1154, 1160.

VI

Appellants claim that a finding by the Police Advisory Board that a police officer used excessive or unnecessary physical force against complainant under the circumstances is tantamount to a determination of criminality and entitles the police officer to indictment by a grand jury, trial by jury, and the defense of double jeopardy should a criminal prosecution follow.[5]

The finding that a police officer used excessive or unnecessary physical force under the circumstances is not a determination of criminality; the finding is not punishable by fine or imprisonment or both: *Bloom v. Illinois,* —— US ——, 20 Led 2d 522, 528. While the conduct may also constitute a crime, the Board is not directed to make its findings in accordance with the penal law and does not suggest that it has found the police officer guilty of a crime. Contrast *Jenkins v. McKeithen,* 286 F. Supp. 537 (E.D.La.) probable juris. noted, 37 US Law Week 3208. The Board's existence is not predicated upon assisting the district attorney in ferreting out crimes committed by police officers (*Ibid*).

Moreover, only those accused of serious crimes are entitled to indictment by grand jury and trial by jury under

[5]Such a claim, if meritorious, invalidates all departmental disciplinary proceedings as well as civil actions based upon assault, to name just a few proceedings.

the Fourteenth Amendment: *Duncan v. Louisiana,* —— US ——, 20 Led 2d 491, 496. A critical factor in determining whether a crime is serious in this respect is the potential term of imprisonment (*Ibid*). There is no imprisonment following a determination by the Police Advisory Board.

With respect to the issue of double jeopardy, the appellants are premature in raising this question since no criminal prosecution has been brought against police officers whose conduct was investigated by the Board. Nevertheless, it has long been held in New York that a disciplinary proceeding which may result in dismissal or some other penalty is a civil proceeding and not susceptible of a claim of double jeopardy: *Evans v. Monaghan,* 306 NY 312, 324, 118 NE 2d 452, 458; *Kramm v. Board of Regents,* 51 Misc. 2d 433, 436, 273 NYS 413, 416; *Brawer v. Criminal Court,* 47 Misc. 2d 411, 261 NYS2d 990. Clearly, an administrative procedure which cannot result in any punishment at all, but at most a recommendation to another agency which must itself conclude a disciplinary proceeding before imposing any penalty, cannot place a police officer in double jeopardy.

VII

The words "excessive or unnecessary physical force" are attacked by appellants as being so vague in defining prohibited conduct as to render the ordinance permitting the Board's investigation of complaints of police brutality unconstitutional. The words attacked are, to the contrary, clear and specific in meaning, and would be to a man of common intelligence. They contemplate force "exceeding the usual, proper, or normal" and "beyond whatever is essen-

tial for some purpose": *Webster's Third International Dictionary* (1966). Similar language is regularly employed in penal laws. The new New York Penal Law uses language such as "necessary" and "reasonable" in defining the justification for use of physical force in defense of a person: New York Penal Law §35.15.

The police officer really complains here of his inability to predict what conduct the Police Advisory Board will conclude falls under the terminology excessive or unnecessary. This determination could not be more narrowly particularized by City Council without nullifying the purpose of creating the Police Advisory Board. Even so, the standard as is is set forth, meets the "constitutional test of requisite certitude": *Doe v. C.A.B.*, 356 F 2d 699, 701 (10th Cir.). Moreover, the Police Advisory Board, having reached a determination of excessive or unnecessary physical force, does not impose penalty, fine, imprisonment or suspension upon the police officer whose conduct is subject to the determination. The standard, then, is not subject to the same strict definition to which such a standard might be held if the ordinance deprived the police officer of life, liberty, property, license, or freedom of expression: *Whitehill v. Elkins*, 389 US 54, —, 19 Led 2d 228, 232; *Cramp v. Board of Public Instruction*, 368 US 278, 287, 7 Led 2d 285, 292; *Jordan v. DeGeorge*, 341 US 223, 231, 95 Led 886, 892.

The police officer, as employee, is subject under the civil service laws (and in this particular case to a Charter provision encompassing the civil service requirements) to a complete review of his behavior for purposes of discharge, fine, reprimand or suspension. The Rochester police officer can be fired for being guilty of some delinquency or misconduct showing an unfitness for office, standards far less particular than the one here attacked (Exhibit B, JS). The police officer, as "trustee of the public interest" can be held

accountable for conduct which was violative of that trust and can be expected to conduct himself in accordance therewith in the absence of narrow particularization of its limits: *Gardner v. Broderick*, 392 US 273 —, 20 Led 2d 1082, 1086.

CONCLUSION

It is submitted that the decisions of the Appellate Division and the Court of Appeals are correct in finding no constitutional impediment to the ordinance creating the Rochester Police Advisory Board, that appellants' questions are so unsubstantial as not to need further argument, and that the appeal should, therefore, be dismissed.

Respectfully submitted.

STERLING L. WEAVER
Counsel for Appellees
Office and Post Office Address:
One Exchange Street
Rochester, New York 14614

Of Counsel

ROBERT A. FELDMAN
Corporation Counsel of the City of Rochester

RUTH B. ROSENBERG